



[2016] HCATrans 226

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S61 of 2016

Between -

PLAINTIFF S61/2016

Plaintiff

and

MINISTER FOR IMMIGRATION AND
BORDER PROTECTION

Defendant

GAGELER J

TRANSCRIPT OF PROCEEDINGS

FROM SYDNEY BY VIDEO LINK TO MELBOURNE

ON MONDAY, 26 SEPTEMBER 2016, AT 10.20 AM

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MR S.B. LLOYD, SC: May it please the Court, I appear in this matter for the plaintiff. (instructed by Fragomen (Australia) Pty Limited)

5 **MR S.P. DONAGHUE, QC:** If it please the Court, I appear in this matter for the defendant. (instructed by Australian Government Solicitor)

HIS HONOUR: Thank you.

10 **MR DONAGHUE:** Your Honour, I apologise for the delayed start, I got caught up in the queue outside the Court.

HIS HONOUR: Thank you, Mr Donaghue. Well, Mr Lloyd?

15 **MR LLOYD:** I do not know if you want to hear from my friend first as it was his request or if you want me simply to address in response to his written submissions.

20 **HIS HONOUR:** Well, I have read his written submissions. It would be best if you address them, I think.

25 **MR LLOYD:** Certainly. The application – I mean, the matter raised against us is the question of the utility of the proceedings. The application sought relief by way of mandamus and also some declaratory relief which turned on whether or not there had been unlawfulness in relation to either the validity of Direction 62 or the application of Direction 62 to my client. No admission has been made in relation to unlawfulness in relation to that. We accept what is said in the submissions that Direction 62 has been revoked.

30 We also accept that under Direction 72 the points of complaint we made about Direction 62 are not there so we do not seek any amendment to challenge Direction 62. We also accept that under Direction 72 my client has now been able to access the exception pertaining to compassionate and compelling circumstances and that a Minister's delegate has made a
35 decision that there are compassionate and compelling circumstances in my client's case and they at least appear to be now actively considering his client's visa applications. So we acknowledge all of that.

40 In addition, we say the declaratory relief that was sought could have been relevant, and could still be relevant, to my client in relation to the possibility of obtaining compensation. So, there is, for instance, an act of grace payment scheme under the Public Governance Act administered by the Department of Finance and there needs to be special circumstances to access that scheme and we would contend that declaratory relief about
45 unlawfulness either as to the validity of the Direction 62 or as to the way it

was applied to my client would be something that would be expected to be considered to be weighty and of significance in any such application.

50 Can I pass you up, your Honour, a decision of Justice Gummow of this Court? It is a decision in *Ahmed v Minister for Immigration* [2011] HCATrans 35. In this case, there was certain relief sought by way of mandamus, certiorari and declarations in relation to a challenge to a so-called automatic visa cancellation. One sees at the bottom of what is page 2 at about line 35 is said:

55 the plaintiff not only denies the receipt of any section 20 notice, but also contends that no notice was sent . . . The consequence would be that section 137J did not operate –

60 which is to say there would be no cancellation. Then in the next paragraph it says:

65 The plaintiff seeks a judicial determination to that effect so as to advance his case for a favourable exercise of the special power given the Minister under section 351 of the Act -

There is a non-compellable discretionary power of the Minister. Now, it goes on in the balance of that paragraph:

70 But it should be noted that even if the plaintiff were to establish that no section 20 notice had been sent, an alternative ground for refusing his application would still remain.

75 So the gist of that is that this was a case in which there was a challenge to the validity of a cancellation decision and although the – even if wholly successful in having that found to be unlawful and set aside it could have relevance to assist in advancing a case for an exercise of a non-compellable discretionary power. One sees then over to the bottom of page 3 about four lines from the bottom:

80 If the plaintiff was successful in this Court in obtaining an order under section 486A(2) –

85 that is for an extension of time:

then upon remitter he would seek certiorari to quash the rejection of the September 2007 application and mandamus requiring the Minister to reconsider that application according to law.

90 Upon such reconsideration, however, it presently appears that the Minister would be obliged to refuse the September 2007

application . . . The plaintiff also would seek, even in the absence of other relief, a declaration that the first student visa was not validly cancelled on 28 March 2007 by operation of 137J of the Act.

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And then the most important bit perhaps is at line 106:

It could not be said that the declaration should not be made because it would lack utility and produce no foreseeable consequences for the parties (the plaintiff and the Minister) and given the significance that the Minister could be expected to attach to the declaration in the exercise of the special power conferred on the Minister by section 351.

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Now, what we say is that in this case there is still a dispute – and to be fair, my friend is not saying anything to the contrary, it is not like the matter is hypothetical – there is still dispute and declaratory relief by the Court could assist my client in advancing a case in relation to an act of grace payment; also it could assist in relation to any other compensation claim that my client might make for any other cause of action that he may have.

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I should indicate that my instructions are that my client wishes to keep the date of 7 October and wishes on 7 October to make a request for compensation to the Court.

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HIS HONOUR: To the High Court?

MR LLOYD: They are my instructions. But if the Court is not prepared in all the circumstances to hear such a request, his alternative preference would be to press ahead to get the declaratory relief which could possibly assist him in relation to an act of grace type payment or any other cause of action for compensation that he may wish to pursue in the future.

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HIS HONOUR: The act of grace type payment is what, a payment made under statute or pursuant to some executive scheme?

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MR LLOYD: There is an administrative scheme but there is a statutory power which is section 65 of the *Public Governance, Performance and Accountability Act* which is very simple, I can just read it to your Honour:

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The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances.

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So, the proposition is that unlawfulness, at least in circumstances if there is no other cause of action such as misfeasance or anything else, may be a

140 matter that the Minister for Finance may take into account. My client has had his visa – on his case, his family’s visa applications delayed and, on his case, that has resulted or exacerbated mental health issues that he and his wife suffer from and he feels that in addition to declaratory relief he would ultimately like to seek some form of compensation.

145 **HIS HONOUR:** All right, thank you. Mr Donaghue.

150 **MR DONAGHUE:** Your Honour, most of the matters that we have addressed in our written submission appear to be accepted by our friend so if it please the Court I will confine my remarks orally to the submissions that Mr Lloyd has just made then rather than developing what I have already said in writing.

155 The essence of our submission is that declaratory relief in these circumstances would not have a sufficiently foreseeable consequence to meet the well-established test in *Ainsworth* applied many times since, recognising that the appropriate grant of declaratory relief marks the boundaries of judicial power.

160 *Ahmed’s Case* upon which my friend relies is, as your Honour will have noted, a case where what his Honour Justice Gummow was deciding was an extension of time application in circumstances where, as you can see from near the bottom of page 3, it was accepted by the parties that if the extension of time application was granted then the matter would be remitted to the Federal Magistrates Court to determine the substance of the points raised.

165 So what my friend is asking for here is very different from what Justice Gummow was considering in that the suggestion is that there should be a hearing before the Full Court of this Court on all of the matters raised on a final basis, notwithstanding the fact that, in our submission, it is clear that the relief as sought in the application cannot reasonably be expected to have any real consequence, in circumstances both where not only has the direction that is actually challenged been revoked but the new direction has an exception which has been found to apply such that the order of processing priorities that lies at the heart of the dispute that would be argued before the Full Court if the matter proceeds has no significance at all for the future processing of his family’s application.

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180 Insofar as the case is now put as a case about compensation, this morning is the first time that has been put and, in our submission, it is not a submission that should be given great weight. Your Honour will have noted that the plaintiff in this proceeding is not actually the visa applicant, he is a sponsor, so the proposition is that somebody who sponsors a visa application made by other persons should receive an act of grace payment

185 and that the prospect of receipt of such payment will be sufficiently
influenced by an argument about the legality of processing priorities that no
longer apply to him; all of that, your Honour, in circumstances where it is
not accepted, and so would have to be litigated, whether or not there was
unlawfulness in respect of the plaintiff. Does your Honour have on the
Bench with you the special case book or alternatively - - -

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HIS HONOUR: Yes, I do have that. Thank you.

MR DONAGHUE: So near the front of the special case book you will see
at page A5 our friend's application.

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HIS HONOUR: Yes.

MR DONAGHUE: The declaratory relief that seems to underpin my
friend's submissions is, we apprehend, order 2, which is a declaration
200 sought about the proper construction of the now revoked declaration 61, so
that would be what we would be arguing about on 7 October. But none of
the relief that is sought is sought in terms that would involve a conclusion
by the Court about whether or not in respect of this particular plaintiff an
unreasonable time was taken in the processing of the application made by
his family member.

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210 So what our friend was seeking to do in this proceeding, or the
plaintiff was seeking to do, was to clear away the impediment that
Direction 62 posed to the processing of his application but not actually to
seek relief that a reasonable time had passed such that there was now a duty
to make a decision on the application.

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On the submissions that the Minister has advanced, and would
advance before the Full Court if the matter proceeds, the argument would be
that this direction needs to be read down such that it does not prevent a
decision being made if that is required in order to comply with the statutory
obligation to make a decision within a reasonable time, that restriction now
being expressly acknowledged in terms by paragraph 9 of the new
Direction 72.

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225 So what I am putting to your Honour is that even if the matter were
to proceed the result of the litigation would not be a decision that there had
been an unreasonable time taken to process the application that had been
made, it could only be a declaration about the meaning of Direction 62, and
that that, in my submission, is so tenuously related to any discretionary
compensation application that might be made that it does not provide a
sufficient basis for the Full Court to embark on a hearing about the
construction and operation of a now revoked determination. Unless the
Court has any questions, those are my submissions.

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HIS HONOUR: No, thank you. Mr Lloyd.

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MR LLOYD: The only thing I would say is I accept what my friend says, that the Court would not need to, if the matter proceeded, make any finding as to whether my client had suffered an unreasonable delay. However, if the relief in paragraph 2 was acknowledged, so if there was a declaration to that effect, that would in the context of the undisputed facts of this case be one where my client would then have not had the direction applied to him properly and, in fact, he would have been told, and was told, that until you become a citizen nothing is going to happen and then, in those circumstances, he suffered a delay.

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Now, whether that delay was unreasonable or not there are still circumstances where his family are stuck in Quetta and he was here, although he is back there now to help look after them, and in those circumstances there would be unlawfulness and there would be undisputed delay. Whether the delay is long enough to constitute unreasonable delay would not be something that would preclude a request being made under the act of grace payment scheme or for any other form of compensation. May it please the Court.

HIS HONOUR: Thank you, Mr Lloyd. Would you hand to me, Mr Lloyd, the legislation that you referred to?

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MR LLOYD: Certainly, your Honour.

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HIS HONOUR: On 6 July 2016, I made an order by consent which had the effect of referring for a hearing before the Full Court of the High Court a special case concerning relief sought by the plaintiff in accordance with an amended application for an order to show cause filed on 20 June 2016. By that application, the plaintiff challenged the validity of Direction 62 made by the defendant Minister, purportedly under section 499 of the *Migration Act* 1958 (Cth). Direction 62 gave guidance to delegates on the order for considering and disposing of Family Stream visa applications. The special case has for some time been set down for hearing before the Full Court on Friday, 7 October 2016.

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On 13 September 2016, the Minister made a further direction under section 499 which revoked Direction 62 and in its place specified altered guidance to delegates on the order for considering and disposing of Family visa applications. The effect of Direction 72, it is accepted, has been to remove for the future the limitations on processing which formed the substantial basis of the challenge to the validity of Direction 62.

275 The question before me is whether the proceeding remains of any
utility. Mr Lloyd, who appears for the plaintiff, puts that the declaratory
relief sought in the amended application concerning the construction and
280 validity of Direction 62 would possibly be of utility in an application that
might be made by the plaintiff for an act of grace payment under section 65
of the *Public Governance, Performance and Accountability Act 2013* (Cth)
or in a proceeding that might be made by the plaintiff of an unspecified
nature for compensation on an unspecified cause of action.

285 Mr Lloyd also indicated that the plaintiff wishes, were the hearing to
go ahead on 7 October, to make an application to the Full Court for
compensation on that day. Again, there has been no specification as to the
nature of that potential claim for compensation.

290 In the circumstances, I am not satisfied that the declaratory relief
sought in the amended application would have sufficient utility to warrant
the proceeding continuing. I propose to accede to the application of the
defendant for the hearing on 7 October to be vacated and for the amended
application for an order to show cause to be dismissed.

295 The orders that I will therefore make are as follows:

1. Vacate order 1 of the orders made on 6 July 2016.
2. Vacate the hearing scheduled to occur before the Full Court
300 on 7 October 2016.
3. Dismiss the amended application for an order to show cause
filed on 20 June 2016.
- 305 4. The defendant is to pay the plaintiff's costs of the proceeding.

The Court will now adjourn.

310 **AT 10.45 AM THE MATTER WAS CONCLUDED**



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